

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

APR 18 1997
BY: [Signature]

Exhibit C

THE STATE OF NEW YORK,

Plaintiff,

-vs-

STIPULATION AND ORDER
OF SETTLEMENT

Case No. 97-CV-0596(Sr)

PVS CHEMICALS, INC. (NEW YORK),

Defendant.

Plaintiff the State of New York ("plaintiff" or the "State") and defendant PVS Chemicals, Inc. (New York), now PVS Chemical Solutions, Inc. ("defendant" or "PVS"), by their attorneys, stipulate and agree as follows:

I. Background

A. The State, on behalf of itself and as parens patriae on behalf of its residents, has filed the above-entitled action alleging that PVS has violated and continues to violate the Clean Water Act ("CWA"), 33 U.S.C. §1251 et seq., the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §6901 et seq., New York State Environmental Conservation Law ("ECL") Articles 17 and 19, regulations effective pursuant to these statutes, and the New York common law of public nuisance, by discharging and disposing of pollutants to the waters of the State, including the Buffalo River and groundwater, to the ground, and to the air, and by maintaining illegal solid and hazardous waste activities and contaminant conditions at PVS's Buffalo, New York facility.

B. PVS is the owner and operator of a chemical manufacturing facility located in Buffalo, New York, on property commonly known as 55 Lee Street ("facility"), and has answered the State's complaint, denied its allegations and asserted defenses thereto.

C. The State and PVS (collectively "the Parties") agree that the entry of the Stipulation and Order of Settlement ("Stipulation and Order") is in the public interest, and consent to its approval by the Court as an appropriate way to resolve the dispute without further litigation at this time.

II. Jurisdiction and Venue

This Court has jurisdiction over the subject matter of this action and over the Parties to this Stipulation and Order pursuant to Section 505(a)(1) of the CWA, 55 U.S.C. §1365(a)(1), Section 7002(a) of RCRA, 42 U.S.C. §6972(a), and 28 U.S.C. §1331, and has supplemental jurisdiction over State law claims pursuant to 28 U.S.C. §1367. Venue in this Court is proper pursuant to 28 U.S.C. §1391(b).

III. Retention of Jurisdiction

The Court shall retain jurisdiction over the subject matter of this action and the Parties to this Stipulation and Order to enforce its terms and conditions upon application by either party, and to resolve disputes arising hereunder.

IV. Applicability and Binding Effect

A. The provisions of this Stipulation and Order shall apply to and be binding upon the Parties. To the extent provided by Fed. R. Civ. P. 65(d), the provisions of the Stipulation and Order also are binding upon defendant's officers, agents, servants, and employees, and are binding upon those persons in active concert or participation with the defendant, their officers, agents, servants or employees who receive actual notice of this Stipulation and Order. The provisions of this Stipulation and Order shall also be binding upon the successors or assigns of the defendant to the same extent that they are binding upon the defendant, and upon the officers, agents, servants, and employees of defendant's successors or assigns, and those persons in active concert or participation with the successors or assigns who receive actual notice of this

Stipulation and Order.

B. The defendant shall give a copy of this Stipulation and Order, and written notice of the existence of any unfulfilled requirements of this Stipulation and Order, to any and all successors-in-interest no later than thirty (30) days prior to any transfer of ownership or operation of the facility or any part thereof affected by said unfulfilled requirements. Simultaneously with such notice, the defendant shall notify plaintiff of such proposed succession-in-interest and that such notice and copy has been given by the defendant. The defendant shall condition the transfer of ownership or operation of the facility or any part thereof on the successor's(s')-in-interest agreement to fulfill the terms and conditions of this Stipulation and Order. In the event that the defendant transfers ownership or operation of only a portion of the facility, the defendant shall condition the transfer of ownership or operation of that portion of the facility on the successor's(s')-in-interest agreement to fulfill the terms and conditions of this Stipulation and Order applicable to that portion of the facility.

V. Meetings

A. The Parties through their duly authorized representatives shall meet and confer on a periodic basis following Court approval of this Stipulation and Order to ensure timely performance of its provisions.

B. The Parties recognize that during the performance of this Stipulation and Order, a Party may wish to discuss issues relating to the measures and the schedule of activities required by this Stipulation and Order. The Parties agree that, at the request of either Party, the other Party shall meet and discuss any issue or request relating to the measures and the schedule of activities required by this Stipulation and Order which is raised by a Party. The Parties shall send to any such meetings responsible and appropriate representatives to properly discuss and address

the issues raised. In doing so the Parties shall provide appropriate technical information, review in good faith technical information provided, respond to the issues raised, address technical information relevant to such issues, and, if applicable, respond in writing to any written request made by the other Party.

VI. Review of Submittals

A. The State shall timely review each of the submittals PVS makes pursuant to this Stipulation and Order to determine whether it was prepared, and whether the work done to generate the data and other information in the submittal was done, in accordance with this Stipulation and Order, generally accepted technical and scientific principles, and applicable law. The State shall notify defendant in writing of its approval or disapproval of PVS's submittal within thirty (30) days of the State's receipt of the submittal, or such other time period as agreed to by the Parties. All State-approved submittals shall be incorporated into and become an enforceable part of this Stipulation and Order, subject where applicable to the dispute resolution provisions set forth below.

B. If the State disapproves a submittal, it shall so notify PVS in writing and shall specify the reasons for its disapproval. Within thirty (30) days of PVS's receipt of the disapproval, or such other time period as agreed to by the Parties, PVS shall either (i) make a revised submittal to the State that addresses plaintiff's stated reasons for disapproving the first submittal, (ii) make a proposal to the State that describes the means by which the State's reasons for disapproval will be resolved and includes a schedule by which those means shall be implemented, or (iii) notify the State that PVS believes the submittal was made in compliance with the terms of this Stipulation and Order.

C. After receipt by the State of the revised submittal, proposal, or notification as

described above, the Parties shall confer together to resolve any differences. If after conferring, there remains a dispute between the State and PVS, either party may invoke the dispute resolution provisions set forth below.

VII. Dispute Resolution

Any dispute that arises with respect to the meaning or application of this Stipulation and Order, or with respect to any work, action, plan, schedule or submittal pursuant to this Stipulation and Order, shall, in the first instance, be the subject of negotiations between the State and PVS. The State and PVS shall consult together in good faith and exercise their best efforts to resolve any differences or dispute without resort to the procedures described below. During the period of any dispute, including during negotiations, all obligations hereunder not necessarily dependent on the disputed issue (or obligations that, though originally disputed, have been resolved through negotiations) shall be performed. The performance of all disputed issues, and matters necessarily dependent thereon, shall be deferred during the pendency of efforts at dispute resolution, or during subsequent proceedings thereon. At the termination of unsuccessful negotiations, either party to the dispute may file with the Court a petition that (along with any supporting documents) shall describe the nature of the dispute and shall include a proposal for its resolution. The other party shall have thirty (30) days to file a response. The Court may hold an evidentiary hearing to aid in resolving the dispute. The determination rendered by the Court shall bind the State and PVS. Where the dispute involves an issue of technical judgment regarding the implementation or scope of the measures required under this Stipulation and Order, the Court will take into appropriate consideration the positions of each party, and any expertise and professional judgment presented to the Court.

III. Groundwater and Soil-Related Investigation

A. PVS has submitted and the State has approved a "Work Plan for Environmental Site Investigation at PVS Chemical Solutions, Inc." ("Site Investigation Work Plan") prepared by Frontier Technical Associates, Inc. The Site Investigation Work Plan is incorporated herein and made a part of this Stipulation and Order. A copy of the Site Investigation Work Plan is attached as Exhibit A. Upon the effective date of this Stipulation and Order, PVS shall commence performance of, and thereafter complete the timely implementation of, the environmental site investigation in accordance with all of the terms of the Site Investigation Work Plan, including but not limited to the timely delivery of the reports described therein.

IX. Direct River Discharge Measures

On or before November 1, 2003, subject to weather-related delays for items requiring outdoor construction, PVS shall complete construction and implementation of either Option A, a cooling tower system, or Option B, a treatment/pH adjustment system, as described herein:

Option A. Within the time frame described above, PVS shall construct and implement a cooling tower system at the facility, thereby eliminating point source discharges from the facility to the Buffalo River that have heretofore required a State Pollutant Discharge Elimination System ("SPDES") permit. Until the cooling tower system commences operation and the point source discharges from the facility cease, said discharges must comply with the terms and conditions of SPDES permit No. NY0110043.

Option B. PVS has submitted and the State has approved a proposed design for a pH adjustment system for the facility's cooling water discharge from outfall 001 to the Buffalo River. The proposed design ("Design Plan") is contained in a report entitled "pH Adjustment System" prepared by Conastoga Rovers & Associates. The Design Plan is incorporated herein

and made a part of this Stipulation and Order, and a copy of the report containing the Design Plan is attached as Exhibit B. PVS shall include the Design Plan, associated engineering report(s) and specification(s) as appropriate, and an updated schematic piping layout indicating cooling water conveyance re-routing, in a revised and timely submitted SPDES permit application. Subject to permit issuance, PVS shall complete construction and implementation of the pH adjustment system within the time frame described above. A new facility SPDES permit including such pH adjustment system will contain, for the point source(s) subject to said system, a variance for pH parameter exceedences of fifteen minutes per month. Until a newly permitted pH adjustment system commences operation the point source discharges from the facility must comply with the terms and conditions of SPDES permit No. NY0110043.

On or before December 31, 2002, PVS shall determine which of these systems, Option A or Option B, it will construct and implement, and shall notify the State of said determination on or before that date.

X. Containment Measures

A. At the State's request PVS has completed the following facility containment improvement measures:

1. Installation of a high density polyethylene ("HDPE") liner for the Alkylation Acid Process Pumps Containment Area.
2. Installation of a new GCT collection tank and containment dike new lining in the Adams Filter, new gasketing on the Adams Filter and a curbed containment area around the Adams Filter.
3. Installation of a HDPE liner for the Ammonium Thiosulfate Storage Tank Dike.

4. Installation of a HDPE liner for Residual Acid (rank 180).
5. Installation of containment for the Carbate Cooler Pumps.
6. Installation of a high level alarm, improved access to valve, and conversion to separate 60 cycle pumps for the 15% and 26% Oleum Pump Tanks, including Oleum Surge Tanks.

E. Within one hundred and eighty (180) days of the effective date of this Stipulation and Order, and subject to weather-related delays for items requiring outdoor construction, PVS shall complete the following containment improvement measures:

1. Repair cracks in the containment area for the #4 Dry Tower and Pump Tank Dike during installation of replacement tower.
2. Repair cracks in the Caustic Storage Dike (rank 45).
3. Installation of a HDPE liner for the Sodium Bisulfate Storage Dike (tanks 185, 186, 187).
4. Installation of containment and HDPE liner for the Waste Tank (430).
5. Evaluate and ensure sufficient integrity and capacity of the Transformer Containment Area.

XI. In-ground Conveyance System and Facility Ground Surface Sealing Measures

PVS has submitted and the State has approved a report regarding, inter alia, inspection and evaluation of facility in-ground conveyance systems, excavation and/or sealing of certain in-ground pipes and trenches, and the sealing of facility grounds. The report with attachments is incorporated herein and made part of this Stipulation and Order. A copy of the report is attached as Exhibit C. Within one hundred eighty (180) days of the effective date of this Stipulation and Order, subject to weather related delays for items regarding outdoor work, PVS shall complete

implementation of the measures described in the report in accordance with the order.

XII. Air Measures

A. PVS has submitted and the State has approved a Continuous Emissions Monitoring System ("CEMS") Preliminary Monitoring Plan ("PMP") prepared by E³-Killiam, Inc. The CEMS PMP is incorporated herein and made a part of this Stipulation and Order. A copy of the CEMS PMP is attached as Exhibit D. PVS shall implement the CEMS PMP. Should the Title V permitting process for the PVS facility result in any changes that affect the CEMS PMP, the New York State Department of Environmental Conservation ("DEC") and PVS agree to meet and discuss any changes necessary regarding the CEMS PMP, and the CEMS certification scheduling described below.

B. Within one hundred and eighty (180) days of the effective date of this Stipulation and Order, PVS shall certify that the facility CEMS meets the requirements, as applicable, of 40 CFR Part 60, Appendices B and F, and the DEC guidance document entitled "Air Guide 34-Continuous Emission Monitoring."

C. Within two hundred and ten (210) days of the effective date of this Stipulation and Order, PVS shall submit to the DEC for approval a Performance Specification Test Protocol for the certification of the CEMS. The CEMS performance specification testing by PVS shall begin after the protocol is approved by the DEC.

D. PVS shall notify the DEC of the date upon which the CEMS Performance Specification Test will commence at least thirty (30) days prior to the performance test.

E. PVS shall submit to the DEC for approval a CEMS Performance Specification Test Report within thirty (30) days after completion of such test.

F. Within ninety (90) days of approval of the CEMS Performance Specification Test

Report, PVS shall submit to the DEC for approval a CEMS Quality Assurance Plan. This plan shall include a description of how PVS will carry out the quality assurance procedures required by 40 CFR Part 60, Appendix F, and all other information as described in the above-referenced DEC Air Guide 34.

G. Upon approval of the CEMS Quality Assurance Plan, PVS shall submit a quarterly written report for every calendar year quarter. Copies of the quarterly report must be postmarked within thirty (30) days after the end of each calendar quarter and forwarded to the following DEC officials: the Director, Bureau of Air Quality Surveillance, 625 Broadway, Albany, NY 12233; and the Regional Air Pollution Control Engineer, 270 Michigan Avenue, Buffalo, NY 14203. All quarterly reports shall include:

1. A summary of the calculated daily average SO₂ emission rates from emission point 00005.
2. A summary of excess emissions, CEMS down time and CEMS out of control periods reported in a format acceptable to the DEC.
3. A summary of the results of the quarterly monitoring performance audit, reported in the format of 40 CFR Part 60, Appendix F (or equivalent).

Excess emissions shall be identified as any 24 hour block period during which the average emissions of sulfur dioxide, as measured by the CEMS system, exceed applicable requirements. Excess emissions indicated by the CEMS for 24 hour block periods, other than start-up or shutdown periods, may be considered violations of the applicable emission limits.

H. Upon the effective date of this Stipulation and Order, PVS shall maintain a file of all measurements, including:

1. CEMS performance evaluations;

2. All CEMS or monitoring device calibration checks;
3. Adjustments and maintenance performed on these systems or devices; and
4. All other information required by 40 CFR Part 60 and DEC Air Guide 34,

recorded in a permanent form suitable for inspection.

The file of measurements shall be retained by PVS for at least three (3) years following the date of such measurements, reports and records.

I. Within thirty (30) days of the effective date of this Stipulation and Order, PVS shall complete installation of an automated ammonia shutdown system acceptable to the State that utilizes electrically actuated ball valves to automatically shut off the flow of ammonia from the ammonia tank car.

J. PVS shall continue to provide all process operators training in proper operation concepts, recognition of process upsets, and conditions requiring immediate process shutdown. Documentation of training acceptable to the State is incorporated herein and made a part of this Stipulation and Order. A copy of the training documentation is attached as Exhibit E.

K. At the State's request, PVS has modified the pH alarm system for the process scrubber associated with facility emission point 00160 in a manner acceptable to the State. The modifications include audible and/or highly visible alarm(s), to alert operators to process upsets leading to excessive emissions.

L. At the State's request, PVS has provided and will continue to provide instruction to facility personnel in the timely initiation of the Community Alert Network ("CAN").

XIII. Civil Penalty

In satisfaction of the civil penalty claims of the State against defendant as of the date of Court approval of this Stipulation and Order, defendant shall be liable to the State for a civil

penalty in the amount of \$70,000. Defendant shall, within sixty (60) days of the effective date of this Stipulation and Order, pay an initial amount of \$17,500, to be followed by three payments at four month intervals of \$17,500 each, totalling \$70,000. All payments shall be made by tendering a check in the appropriate sum, payable to "The State of New York," and sent by certified mail, return receipt requested, to "The Attorney General of the State of New York, Statler Towers, 4th Floor, 107 Delaware Avenue, Buffalo, New York 14202, Attention: Timothy Hoffman, Assistant Attorney General."

XIV. Reservation of Rights

A. The terms of this Stipulation and Order and any actions or submissions pursuant to this Stipulation and Order shall not, in any action, proceeding or litigation, constitute or be construed as an adjudication of any issue of fact or law, or as an admission that defendant has violated any law or regulation.

B. Nothing contained in this Stipulation and Order shall be construed as barring, diminishing, adjudicating or in any way affecting:

1. The State's right to proceed against defendant for any liability that may result from the State's determination, after review of the reports submitted upon performance of the Site Investigation Work Plan, that further groundwater and/or soil-related measures are required by law to be performed by defendant, and defendant's right to defend against the same;
2. The State's right to enforce this Stipulation and Order against defendant in the event that defendant fails to fulfill any of the terms or provisions hereof;
3. The Parties' obligation to comply with any and all applicable federal or state laws or regulations;
4. Any legal or equitable rights or claims, actions, proceedings, suits, causes

actions or demands whatsoever that the State may have against anyone other than defendant, its directors, officers and employees; or

5. The State's authority to enforce any and all applicable laws for the protection of the public health, welfare and the environment.

XV. Release

Except as provided in the Reservation of Rights set forth above, this Stipulation and Order shall be in full settlement of all pending civil claims and liabilities against defendant, its directors, officers and employees that are alleged in the complaint and occurred at the facility prior to the effective date of this Stipulation and Order. This Stipulation and Order shall not be construed as being in settlement of events regarding which the State lacks knowledge, or occurring after the effective date of this Stipulation and Order.

XVI. Notices, Submittals and Demands

Whenever, under the terms of this Stipulation and Order, written notice is required to be given, or a written submittal, certification or demand is required to be made, it shall be directed to the individual(s) designated by the undersigned attorneys for the respective Parties.

XVII. Field Work Notice

PVS shall provide notice to the State of the commencement of any work to be conducted pursuant to the terms of this Stipulation and Order. Such notice shall be provided to the State at least five (5) working days prior to such activities.

XVIII. Facility Access

PVS shall, consistent with applicable law, permit upon reasonable notice any duly designated representatives of the State to enter the facility, or areas in the vicinity of the facility which may be under the control of PVS, and any areas necessary to gain access thereto for the

purpose of making or causing to be made such inspections deemed necessary, and for ascertaining defendant's compliance with the provisions of this Stipulation and Order. PVS shall require compliance with site safety procedures.

XX. Force Majeure

Defendant shall not suffer any penalty under this Stipulation and Order, or be deemed to be in violation hereof or be subject to any proceeding or action, if it cannot comply with any requirements hereof because of an act of God, war, riot or acts of third parties or other condition beyond defendant's control, provided, however, that defendant shall notify the State in writing within 72 hours after it obtains knowledge of any such condition and request an appropriate extension or modification of this Stipulation and Order.

XX. Indemnification

Defendant shall indemnify and hold the State, their agents, representatives and employees harmless from all claims, suits, actions, damages and costs of every name and description arising out of or resulting from any negligent act or willful misconduct of defendant, its directors, officers, employees, servants, agents, successors or assigns in the fulfillment or attempted fulfillment of this Stipulation and Order.

XXI. Formal Terms

The provisions hereof shall constitute the complete and entire agreement between the defendant and the plaintiff. No terms, conditions, understandings or agreements purporting to modify or vary the terms hereof shall be binding unless made in writing and subscribed by the Parties. No formal advice, guidance, suggestions or comments regarding reports, proposals, plans, specifications, schedules or any other writing submitted by defendant shall be construed as relieving defendant of its obligations under this Stipulation and Order and as required by law.


XXII. Effective Date

This Stipulation and Order shall become effective upon its entry by the Court.

Dated: 4/18/02

The State of New York
Eliot Spitzer
Attorney General of the
State of New York

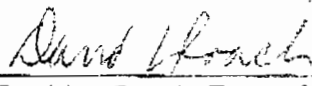
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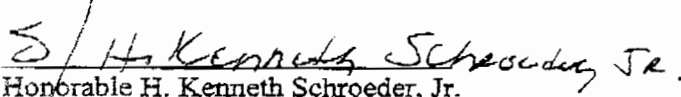
Dated: 4/18/02

PVS Chemical Solutions, Inc.

By:


David L. Roach, Esq., of Counsel
Blair & Roach
2645 Sheridan Drive
Tonawanda, New York 14150
(716) 834-9181

SO ORDERED:


Honorable H. Kenneth Schroeder, Jr.
United States Magistrate Judge

Dated: April 18, 2002